Sjn Thomas a/l Manivello v Lt Kol Din Yati bin Dahlan & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-27 OF 1995
SHAIK DAUD, NH CHAN AND MAHADEV SHANKAR JJCA
21 OCTOBER 1996

Criminal Procedure *— Court — Court martial — When trial begun — Whether court martial proceeded with trial of offences within three years of its commission — Whether trial begins when the charge is read to the accused person and his plea taken — Armed Forces Act 1972 s 144(1)*

The appellant was charged under the Armed Forces Act 1972 ('the Act') before a court martial for offences alleged to be committed on 24 August 1986. He was found guilty of one of the offences. He applied for certiorari to quash the decision of the court martial. The High Court dismissed the application. Hence this appeal.

Learned counsel for the appellant contended that: (i) the learned judge erred in law in not holding that the court martial committed a jurisdictional error and acted in access of jurisdiction when it proceeded with the hearing on 23 June 1990 in contravention of the provisions of s 144(1) of the Act; and (ii) the learned judge erred in law in concluding that the appellant failed to comply with r 101 of the Armed Forces (Court Martial) Rules 1976 ('the Rules') in that he failed to exhaust his right of appeal within the administrative hierarchy. On the first issue, learned counsel for the appellant contended that although the appellant was first produced in the court martial on 16 February 1989 and all the charges were read to him, the trial only commenced on 23 June 1990 when the prosecution called its first witness.

Held, dismissing the appeal:

(1) Section 144(1) of the Act sets a limitation of time for trial of offences under the Act. It is clear that a court martial has no jurisdiction to proceed with a trial three years after its commission, and if it is shown that the court martial in fact proceeded with the trial of offences after three years of its commission, clearly the court would have acted without jurisdiction and therefore certiorari would be the remedy.

A trial begins when the charge is read to the accused person and his plea taken but it only commences at the trial proper when the prosecution calls its first witness. Nowhere in s 144(1) of the Act is mentioned the word 'commencement of the trial'. The words used in this section is 'unless the trial is begun within three years ...'. Therefore, for the purpose of s 144(1), the trial in this case begun when the charges were read to the appellant and his pleas taken, which was on 16 February 1989, and is well within the three years limitation. The record also shows that on

the day the charge was read to the appellant, ie on 16 February 1989 and his plea taken, the case was ready to proceed and the first witness would have been called but for an objection raised the appellant. From this sequence of events, it seems clear that for all intents and purposes, the trial had begun on 16 February 1989 and was therefore well within the limitation period of three years. This also appears to be the intention and understanding of the court and the parties (see pp 332G, I, 333G–I and 334B); *Savrimuthu v PP* [1987] 2 MLJ 173 followed.

(2) As for the second ground of appeal, it is clear that an applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy nor need he have exhausted his right of appeal to a court of law (see pp 334D–E); *Lai Cheng Cheong v Sowaratnam* [1983] 2 MLJ 113 followed.

[Bahasa Malaysia summary

Perayu telah dituduh di bawah Akta Pasukan Bersenjata 1972 ('Akta tersebut') di hadapan mahkamah tentera bagi kesalahan-kesalahan yang dikatakan telah dilakukan pada 24 Ogos 1986. Beliau telah didapati bersalah atas salah satu daripada kesalahan-kesalahan itu. Beliau telah memohon untuk mendapatkan certiorari bagi membatalkan keputusan mahkamah tentera tersebut. Mahkamah Tinggi telah menolak permohonan tersebut. Dengan itu telah mengakibatkan rayuan ini.

Peguam yang bijaksana bagi pihak perayu telah menegaskan bahawa: (i) hakim yang bijaksana telah tersalah pertimbangan di sisi undang-undang dalam tidak memutuskan bahawa mahkamah tentera tersebut telah melakukan kesilapan kehakiman dan bertindak melebihi kehakiman apabila ianya meneruskan perbicaraan pada 23 Jun 1990 dengan melanggar peruntukan-peruntukan s 144(1) Akta tersebut; dan (ii) hakim yang bijaksana telah tersalah pertimbangan di sisi undang-undang dalam memutuskan bahawa perayu telah gagal untuk mematuhi k 101 dari Kaedah-Kaedah Angkatan Bersenjata (Mahkamah Tentera) 1976 ('kaedah-kaedah tersebut'), iaitu beliau telah gagal untuk menggunakan segala hak rayuannya dalam lingkungan hierarki pentadbiran. Mengenai isu pertama, peguam bagi pihak perayu telah menegaskan bahawa walaupun peguam bagi pihak perayu telah pertama kalinya dikemukakan dalam mahkamah tentera pada 16 Februari 1989 dan kesemua tuduhan-tuduhan telah dibacakan kepadanya, perbicaraan tersebut hanya telah bermula pada 23 Jun 1990 apabila pihak pendakwaan memanggil saksinya yang pertama.

Diputuskan, menolak rayuan tersebut:

(1) Seksyen 144(1) Akta tersebut menetapkan satu penghadan masa untuk perbicaraan kesalahan-kesalahan itu di bawah Akta tersebut. Ianya jelas bahawa sesebuah mahkamah tentera tidak mempunyai

bidangkuasa untuk meneruskan sesuatu perbicaraan tiga tahun selepas perlaksanaannya dan jika ianya ditunjukkan bahawa mahkamah tentera itu telah pada hakikatnya meneruskan dengan perbicaraan kesalahan tersebut tiga tahun selepas perlaksanaannya, adalah jelas mahkamah telah bertindak tanpa bidangkuasa dan dengan itu certiorari adalah remedinya.

Sesuatu perbicaraan bermula apabila tuduhan dibaca kepada orang tertuduh dan rayuannya diambil tetapi ia hanya bermula di perbicaraan ketika pihak pendakwaan memanggil saksi pertamanya. Tidak terdapat di mana-mana dalam s 144(1) Akta tersebut disebut perkataan-perkataan 'permulaan perbicaraan'. Perkataan-perkataan yang digunakan dalam seksyen ini adalah 'kecuali perbicaraan itu dimulakan dalam tempoh tiga tahun ...'. Dengan itu, bagi tujuan s 144(1), perbicaraan dalam kes ini dimulakan apabila tuduhan dibaca kepada perayu dan rayuan-rayuannya diambil, yang mana telah dilakukan pada 16 Februari 1989, dan adalah jauh dalam lingkungan tempoh penghadan tiga tahun itu. Rekod tersebut juga menunjukkan bahawa pada hari tuduhan itu dibaca kepada perayu, iaitu pada 16 Februari 1989 dan rayuannya dicatat, kes tersebut telah bersedia untuk diteruskan dan saksi pertama telah dipanggil melainkan bagi satu bantahan yang telah dibangkitkan oleh perayu. Berikutan daripada urutan peristiwa ini, nampaknya jelas bagi segala niat dan tujuan, perbicaraan telah bermula pada 16 Februari 1989 dan dengan itu jauh di dalam tempoh penghadan selama tiga tahun. Ini juga nampaknya merupakan niat dan kefahaman mahkamah dan pihak-pihak tersebut (lihat ms 332G, I, 333G–I dan 334B); *Savrimuthu v PP* [1987] 2 MLJ 173 diikut.

(2) Berhubung alasan rayuan yang kedua, ianya jelas bahawa pemohon untuk certiorari selalunya tidak berkewajipan untuk menggunakan segala hak rayuannya di dalam lingkungan hierarki mahupun menggunakan segala hak rayuannya kepada sesebuah mahkamah undang-undang (lihat ms 334D–E); *Lai Cheng Cheong v Sowaratnam* [1983] 2 MLJ 113 diikut.]

Cases referred to

Lai Cheng Cheong v Sowaratnam [1983] 2 MLJ 113 (folld)
PP v Lim Chen Len [1981] 2 MLJ 41 (refd)
PP v Tay Tuan [1953] MLJ 20 (refd)
Savrimuthu v PP [1987] 2 MLJ 173 (folld)

Legislation referred to

Armed Forces Act 1972 ss 47, 48, 49(b), 144(1)
Armed Forces (Court Martial) Rules 1976 r 101

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Al-Baishah (Attorney General's Chambers) for the respondent.

Shaik Daud JCA (delivering judgment of the court): The appellant filed a notice of motion dated 21 March 1992 in the High Court, seeking an order of certiorari to quash the decision of the Military Court, Kuala Lumpur dated 26 November 1990 whereby the appellant was found guilty of an offence under s 49(b) Armed Forces Act 1972 and was ordered to be demoted from the rank of Sergeant to Corporal.

At the military court, the appellant faced six charges under the Armed Forces Act 1972 for offences alleged to be committed on 24 August 1986. He was acquitted of five of the charges but found guilty of the first charge, which is under s 49 of the Act of 1972 for using threatening words on a superior. The High Court found that there were no 'jurisdictional errors' for it to interfere by issuing a certiorari and thereby dismissed the appellant's notice of motion. Hence this appeal.

Although several grounds of appeal were put up, at the outset of the appeal, learned counsel for the appellant, Mr Karpal Singh, resorted to only two of the grounds. Firstly, he contended that the learned judge erred in law in not holding that the court martial committed a jurisdictional error and acted in access of jurisdiction when it proceeded with the hearing on 23 June 1990 in contravention of the provisions of s 144(1) of the Armed Forces Act 1972. Secondly, it is contended that the learned judge erred in law in concluding that the appellant failed to comply with r 101 of the Armed Forces (Court Martial) Rules 1976 in that he failed to exhaust his right of appeal within the administrative hierarchy.

With respect to the first ground, let us, therefore, examine s 144(1) of the Armed Forces Act 1972, which provides that:

> No person shall be tried by a Court Martial for any offence, other than one against section 47 or section 48 or desertion unless the trial begun is within three years after the commission of the offence ... .

This section, therefore, set a limitation of time for trial of offences under the Armed Forces Act 1972 except for offences under ss 47 and 48 and for desertion. It is clear that a court martial has no jurisdiction to proceed with a trial three years after its commission, and if it is shown that the court martial in fact proceeded with the trial of offences after three years of its commission, clearly the court would have acted without jurisdiction and therefore certiorari would be the remedy. In the present case, there is no dispute that the offence comprised in the first charge was committed on 24 August 1986. This is borne out by the affidavit of the appellant affirmed on 31 December 1990 and confirmed by the affidavit of the respondent affirmed on 3 August 1992. It is contended by learned counsel for the appellant that although the appellant was first produced in the court martial on 16 February 1989 and all the charges were read to him, the trial did not commence then. He contended that the trial commenced on 23 June 1990 when the prosecution called its first witness. The issue before the court is when did the trial of the appellant begun for the purpose of s 144(1) of the Armed Forces Act 1972? Learned counsel for appellant referred us to a few cases on this issue. Firstly, he referred to the case *PP v Tay Tuan* [1953] MLJ 20 where the court had to decide when

A the trial commences with reference to the service of a chemist report. The High Court held that the trial does not commence until his claim to be tried has commenced to be met, ie on the day of the hearing. From this finding, it seems that the trial does not commence on the day the accused is produced and the charge read to him and he makes a plea. Then there is the case of *PP v Lim Chen Len* [1981] 2 MLJ 41, where the court is asked B to determine the same issue, this time with reference to a notice of alibi. The High Court held that 'commencement of the trial' means the commencement of the actual trial itself and not the date when the accused was first charged in court. Then there is the then Supreme Court case of *Savrimuthu v PP* [1987] 2 MLJ 173 where Salleh Abas LP (as he then was) C at pp 176–177 states:

> Whilst we accept that the trial always begins with the reading of the charge and asking the accused to plead, it does not follow that the trial has commenced once the charge is read and the accused says he claims to be tried or even pleads guilty. It all depends upon the intention and understanding of the court and the parties. The reading of the charge can D be a mere matter of formality which is done as a matter of course without any intention to proceed to the trial yet. This happens on the mention date when the court has to fix dates for the trial. But when on the trial date the charge is read, the plea is taken and the prosecution begins to lead evidence, the trial has certainly commenced, and it is commenced naturally with the reading of the charge and the taking of the plea. The reading of the charge E is not really the crux of the matter, because even at the continued hearing of part-heard cases the reading of the charge is as a matter of course automatically done. Thus, in this context the commencement of trial must mean the commencement of the examination, cross-examination and re-examination of one or more witnesses.

F On perusal of this finding and that of the other two High Court findings, it seems to us that there are separate meanings given to when a trial begins and when it commences. It also seems to take into consideration the intention and understanding of the court and the parties. Therefore, from these decided cases, we can come to the conclusion that a trial begins when the charge is read to the accused person and his plea taken but it G only commences at the trial proper when the prosecution calls its first witness. Applying this to the present case, we find that nowhere in s 144(1) of the Armed Forces Act 1972 is mentioned the word 'commencement of the trial'. The words used in this section is 'unless the trial is begun within three years ...'. We find that this the very phrase used by the court in H *Savrimuthu v PP* when Salleh Abas LP (as he then was) states, 'Whilst we accept that the trial always begins with the reading of the charge and asking the accused to plead, ...'. Therefore, for the purpose of s 144(1), if the trial in this case is begun, ie when the charges were read to the appellant and his pleas taken, which was on 16 February 1989, it is well within the three years limitation. The record also shows that on the day the I charge was read to the appellant, ie on 16 February 1989 and his plea taken, the case was ready to proceed and the first witness would have been called but for an objection raised the appellant on one member of the panel and, after arguments were heard, the court replaced two members of

the panel and was ready to proceed. At this juncture, the defence counsel for the appellant requested for an adjournment on the ground that he was not well versed with the case and the court acceded to the request and adjourned the case to 22 June 1990. From this sequence of events, it seems clear to us that for all intents and purposes, the trial had begun on 16 February 1989 after two members of the panel were replaced following an objection by the appellant. This also appear to be the intention and understanding of the court and the parties. Therefore, we would hold that in the context of this case, and for the purpose of s 144(1), the trial has begun on 16 February 1989 and is therefore well within the limitation period of three years. To hold otherwise would create a situation where in a case which begins and is ready to proceed say, one week short of three year limitation, the accused person need only request a postponement to catapult the actual hearing beyond the three year limit, thereby thwarting the prosecution and defeating the ends of justice. Surely, this is not the intention of the legislature in enacting s 144(1).

As for the second ground of appeal, ie r 101 of the Armed Forces (Court Martial) Rules 1976, the short answer is to be found in the then Federal Court case of *Lai Cheng Cheong v Sowaratnam* [1983] 2 MLJ 113 where the court held that an applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy nor need he have exhausted his right of appeal to a court of law. Therefore, it is not necessary, having regard to the facts of this case, to resort to that section.

Therefore, on the first ground above, we find that the learned judge was correct when he held that there was no irregularity in the proceedings before the court martial. The appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Reported by Loo Lai Mee